REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022-060221

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

……………………… ……………………………
DATE
SIGNATURE

In the matter between:

SUMARIE WADE	Applicant
and	
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA	First respondent
GRETCHEN BARKHUIZEN-BARBOSA N.O.	Second respondent
TASMYN LEIGH FITZGERALD	Third respondent
AMEY CAITLYN FITZGERALD	Fourth respondent

JUDGEMENT

H A VAN DER MERWE, AJ:

1. This is an application in terms of section 2(3) of the Wills Act 7 of 1953 (the Wills Act). The applicant seeks an order directing the Master to accept a document (the disputed document) to be the will of the late Adrian John Fitzgerald (the deceased). The applicant was, at a time at least, a romantic partner of the deceased (more on this topic follows below). The first respondent is the Master. The second respondent is the executor[1] appointed by the Master to administer the deceased estate, Ms Gretchen Barkhuizen-Barbosa N.O. The third and fourth respondents are the deceased's daughters, Ms Tasmyn Leigh Fitzgerald and Ms Amey Caitlyn Fitzgerald. The application is opposed by the second, third and fourth respondents (the respondents).

2. In the notice of motion, the applicant also sought orders for the Master to cancel the appointment of the second respondent and to direct the Master to issue letters of executorship to the applicant. These orders were abandoned in argument.

3. The first page of the disputed document reads as follows —

> "**LAST WILL AND TESTAMENT**
>
> **ADRIAN JOHN FITZGERALD**
>
> This is the last will and testament of ADRIAN JOHN FITZGERALD dealing with the distribution of my South African based assets.
>
> 1. I hereby revoke, cancel, annul and make void all previous wills, codicils, and other testamentary dispositions heretofore made or executed by me.
>
> 2. I nominate SUMARIE WADE as the executor of my will and administrator of my estate and effects, giving and granting to her all such powers and authorities as are allowed and required by law especially that of assumption.

[1] The second respondent describes herself as 'executor' and not 'executrix'. The time may well have arrived for 'executor' to be used to refer to males and females alike.

3. All movable assets, including but not limited to, vehicles and trailers, and all monies in the bank and all investments are ceded to SUMARIE WADE (SA ID No. 6802170036084).

4. My business UHURU INTERNATIONAL CONSULTING (Uhuru) is to be closed and deregistered. The property owned by Uhuru situated at 198 Pofadder Street, Kameelfontein Estate, Kameeldrift is to be either transferred to SUMARIE WADE or sold and the proceeds transferred to SUMARIE WADE.

5. All assets owned by Uhuru are ceded to SUMARIE WADE.

6. I direct that the administrator shall be in respect of the said estate, have full power, in her discretion, to take over all the assets of the estate and effects, movable and immovable, to sell any of the bassets [sic] as she shall deem fit.

7. I want the cheapest possible cremation and no funeral service. The cost of the cremation is to be paid for by my estate.

8. The beneficiary taking under this shall take for her own sole and absolute use and benefit and free from the debts of and excluded from any community of property with any spouse she has married or may marry.

IN WITNESS WHEREOF I have hereunto set my hand at 18h00 this 2 [sic] day of October 2018 in the presence of the subscribing witnesses. All being present at the same time and signing our names in the presence of one another.

Adrian John Fitzgerald [signed]

……………..

Signature

AS WITNESS

1. Antoinette Leonie Cronje [signed]

…………….."

4. The second page of the disputed document contains only the following at the top of the page —

> “ Signature
>
> 2. Stephanas Lourens Jacobs Cronje [signed]
>
> ………………....
>
> Signature”

5. The signatures of the deceased and the two witnesses appear on the disputed document where the word “signed” appears in square brackets above.

6. The Master rejected the disputed document without providing a reason for doing so. The applicant and the respondents seem to accept that it was the second witness’s signature on the second page of the disputed document that led the Master to reject it. No other reason was suggested for the Master’s rejection.

7. The deceased also appended his signature on another document that is similar in appearance to the disputed document, although its content is different. This document deals with the deceased’s “*UK based assets*” according to its terms. The third and fourth respondents are the beneficiaries under this document. It contains the exact same paragraph as the disputed document that commences with the words “*IN WITNESS WHEREOF*…”

8. Mr Thompson who appeared for the applicant conceded that the disputed document does not comply with section 2(1)(a)(iv) of the Wills Act as the second witness’s signature is not on the first page of the disputed document. Hence, the applicants’ case is based on section 2(3) of the Wills Act. Section 2(3) reads as follows in relevant part —

> “If a court is satisfied that a document …drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will …, the court shall order the Master to accept that document … for the purposes of

> the Administration of Estates Act, 1965 (Act 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1)."

9. I am required to decide whether on the facts the deceased intended the disputed document to be his will. If I am so satisfied, I am required to order the Master to accept it as the deceased's will. I have no discretion in the matter.[2] To decide this issue, I am required to have regard to the circumstances surrounding the purported signatures of the deceased and the two witnesses- as they appear on the disputed document- and the disputed document itself.[3]

10. The question that came up during argument was whether the enquiry into the surrounding circumstances is limited to the particular moment that the deceased and the witnesses appended their signatures on the disputed document, or whether I should take a wider view of the circumstances, such as how the disputed document came to be created in the first place and whether it was drafted by the deceased or someone else on his instructions and so on. The reason why this question is pertinent is that while the applicant's affidavits cover the moment of the signature of the disputed document, it deals with little else that bears on the intention of the deceased in relation to the disputed document at the time of its signature.

11. It is clear however that the circumstances after the signature of the disputed document are irrelevant, save as far as those circumstances may reveal a fact relevant to the moment of the signature of the disputed document. Lewis JA stated the following in *Van Wetten v Bosch* (*Van Wetten*) —

> "It was argued for Bosch, on the other hand, that the deceased had changed his mind after 5 September 1997…
>
> These factors are not, in my view, relevant in determining what the deceased's intention was at the time of writing the contested will. Evidence as to subsequent conduct is relevant only insofar as it throws light on what was on the mind of the

[2] *Horn v Horn* 1995 (1) SA 48 (W); *Logue v The Master* 1995 1 SA 199 (N); *Ex parte Maurice* 1995 2 SA 713 (C).

[3] 2004 (1) SA 348 (SCA) at para 16.

> deceased at the time of making the contested will (as in *Schnetler NO v Die Meester en Andere*."[4](footnote omitted)

12. In the founding affidavit the applicant deals with the circumstances in which the deceased and the two witnesses are alleged to have appended their signatures as follows —

> "The Deceased and the two witnesses signed "The will" in the presence of each other containing the deceased's wishes. The first witness Antoinette Leonie Cronje signed on the first page and Stepanas Lourens Jacobs Cronje signed on the second page.
>
> …
>
> "The Will" was attested and signed by the deceased at our house in Pretoria in the presence of two witnesses and in the presence of each other. The witnesses been [sic] Anoinette Leonie Crionje and Stephanas Lourens Cronje whose confirmatory affidavits are attached hereto and marked **Annexure "EA8" and "EA9"**." (Boldface in the original).

13. None of the respondents were present at the time when the disputed document was signed. It is therefore no surprise that the allegations quoted above are met with bare denials in the answering affidavit.

14. I am satisfied that on the rules in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* (*Plascon-Evans*)[5], the respondents' bare denials do not raise *bona fide* disputes of fact. I am therefore to take it for granted that the disputed document was signed as alleged by the applicant and the two witnesses.

15. Mr Thompson argued that the content of the disputed document indicates that it was intended by the deceased to be his will. That submission must be correct. The disputed document calls itself a will in its opening lines and in its first paragraph. The rest of its contents is exactly the kind of language one would expect to find in a will and there is nothing that would be out of place in a will.

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[4] Id at para 20-21.

[5] 1984 3 SA 623 (A) 634H - 635C.

16. The only considerations that could stand in the applicant's way towards the order she seeks, is the respondents' affidavits or if I find that the applicant should have dealt with the facts in a more expansive fashion.

17. The respondents alleges that the applicant's claim that she was the life partner of the deceased, right up to his death on 23 January 2022, is not to be believed. In support of their challenge to the applicant's claim to have been the deceased's life partner, the second respondent attaches messages exchanged between the deceased and the applicant on a commonly used instant messaging service called "*WhatsApp*". The messages were exchanged between 12 August 2020 and 31 July 2021.

18. According to the respondents, the deceased left South Africa for the United Kingdom two years before his death. Whilst there, the deceased formed a romantic relationship with Ms Dickins. The text messages indicates clearly enough that the applicant formed the view that the deceased had been unfaithful to her. She says as much in the replying affidavit. According to the applicant, the deceased's infidelity was a source of conflict between them, but not such that it meant the end of their relationship.

19. None of these facts are however relevant, if I were to apply the dictum in *Van Wetten* quoted above. Irrespective of what the allegations in the answering affidavit or the replying affidavit may imply regarding the relationship between the applicant and the deceased, these are developments after the fact of the signature of the disputed document. It does not tell me anything about the intentions of the deceased on 2 October 2018 when he signed the disputed document.

20. Ms Maharaj-Pillay who appeared for the respondents, submitted that the facts on the relationship between the applicant and the deceased shows that the applicant is not a reliable witness. In particular, she submitted that the applicant's allegation in the founding affidavit that she was the deceased's "*life partner and they lived together in a permanent relationship*" is shown in the answering affidavit to be untrue. The applicant qualifies this statement in the founding

affidavit, where she says that the deceased went to the United Kingdom to seek medical treatment in 2020. As stated above, the replying affidavit reveals that the applicant was aware of the deceased's relations with other women, but as it is her version that those relations did not end her relationship with the deceased, it is not clear to me on the affidavits that the respondents have shown that the applicant's version in the founding affidavit is incorrect.

21. More pertinently, in motion proceedings for final relief, factual disputes are resolved in accordance with the rules in *Plascon-Evans.* The probabilities and the reliability or otherwise of the deponents do not enter the picture.[6] I cannot make a credibility finding against the applicant, because before I can do so, she should have had the opportunity to meet the challenge to her qualities as a witness in cross-examination.[7] Ms Maharaj-Pillay's submissions therefore does not alter the conclusion I have come to above on me accepting the applicant's version on the circumstances in which the disputed document was signed by the deceased and the two witnesses.

22. It remains for me to consider the paucity of facts set out in the founding affidavit. As I pointed out above, the founding affidavit deals with the signing of the disputed document, but not with the broader facts surrounding that event. The question is whether it should lead to me to conclude that the applicant did not make out a case in terms of section 2(3) of the Wills Act. In my view, on the facts of this case, it does not. Section 2(3) has to do with a will that does not meet the formal requirements for a valid will. Had it not been for the fact that the second witness's signature appears on the second page of the disputed document, the formal requirements would have been met.

23. The requirement that both witnesses and the testator must append their signatures on the same page of a will, is to validate the testator's signature. If it had been sufficient for a witnesses' signature to appear on another page than the one containing the will and the testator's signature, it would not on its face serve to validate the testator's signature. If the signatures of the testator and the

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[6] *National Scrap Metal (Cape Town) (Pty) Ltd v Murray & Roberts Ltd* 2012 5 SA 300 (SCA) [21] – [22];

[7] *President of the RSA v South African Rugby Football Union* 2000 1 SA 1 (CC) [61] – [65]

witnesses are on the same page as the text of the will and in close proximity to each other one can reasonably expect the witnesses to know or at least question the reason for their signatures. If a signature on a different blank page sufficed, a witness's signature can relatively easily be obtained under some or other ruse, but not so easily if the witness can be expected to see the testator's signature and the document that contains the will.

24. Based on facts that the applicant presented to this court, there is no other reasonable inference than that the deceased appended his signature to the disputed document. It is clear that the disputed document is a will in which the deceased is named as the testator, all that is required to make out a case in terms of section 2(3) is evidence that the deceased is the one who's signature appears on the disputed document.

25. It would have been different if the form of the disputed document was such that it was not clear if it was intended to be a will. For instance, in *Van Wetten*, the form of the document in question was "…*a somewhat incoherent document. It reads in part like a letter to Nolan, the deceased sometimes recording his decisions, sometimes giving instructions, sometimes offering explanations for his decisions*…".[8] Where the form, content or appearance of a document is such that it could conceivably be something other than a will, such as a letter or an early draft of a will, then more evidence may be required.

26. Ms Maharaj-Pillay argued that there is a conflict between the disputed document and the other document that deals with the deceased's property situated in the United Kingdom referred to above. The conflicting provision is said to be the sentence in the latter document that reads: "*All assets owned by Uhuru are to be divided equally between TASMYN LEIGH FITZGERALD and AMEY CAITLYN FITZGERALD".* The conflict is said to lie in the fact in that the disputed document, the assets owned by Uhuru are bequeathed to the applicant. Mr Thompson submitted that there is no conflict because the two documents respectively deal with the deceased assets in South African and in the United Kingdom. His submission is probably sound, but I need not decide this issue,

[8] The full description of the document in issue in *Van Wetten* appears in para [23]–[26] of the judgement.

since it does not appear to me that a conflict between the two documents have any bearing on the deceased's intention in so far as the disputed document is concerned.

27. I am therefore satisfied that the disputed document was intended by the deceased to be his will. I am therefore persuaded to make an order directing the Master to accept the disputed document, for the purposes of the Administration of Estates Act 66 of 1965, as the will of the deceased.

28. It remains for me to deal with an application brought by the respondents to strike out allegations made in the replying affidavit by the applicant on the deceased's relations with other women, on the basis that it is scandalous, vexatious or irrelevant. The third and fourth respondents took umbrage to those allegations because it paints the deceased, their late father, in a negative light. While I do not doubt that the third and fourth respondents found it distressing to have read those allegations, in my view the applicant was entitled to deal with the allegations made in the answering affidavit to the effect that the deceased's relationship with her had come to an end. The allegations the applicant made in the replying affidavit were germane to that issue and therefore permissible.

29. The respondents also sought to strike out certain allegations in the replying affidavit on the basis that it would constitute new material. To be sure the applicant put up allegations in the replying affidavit that were not in the founding affidavit, but those allegations were made in reply to allegations made in the answering affidavit and therefore also permissible.

30. I make the following order:

    (a) The Master of the High Court is directed to accept the document, the contents of which are quoted in paragraph 3 and 4 above, as the will of the late Adrian John Fitzgerald.

    (b) The third and fourth respondents are ordered to pay the costs of the application to strike out.

(c) Otherwise, the costs are to be paid by the deceased estate of the late Adrian John Fitzgerald.

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H A VAN DER MERWE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Heard on: 2 October 2023

Delivered on: 11 October 2023

For the applicant: Adv C Thomson

Instructed by: Riekie Erasmus Attorneys

For the second, third and fourth respondents: Adv P Maharaj-Pillay

Instructed by: Cliffe Dekker Hoffmeyr Attorneys